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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,)	
)	No. 44774
Plaintiff-Respondent,)	
)	Ada County Case No.
v.)	CR-FE-2016-3183
)	
MICHAEL ERIC HAGER,)	
)	
Defendant-Appellant.)	
)	
)	

BRIEF OF RESPONDENT

**APPEAL FROM THE DISTRICT COURT OF THE FOURTH JUDICIAL
DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE
COUNTY OF ADA**

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STATEMENT OF THE CASE

Nature of the Case

Michael Eric Hager appeals from the judgment entered upon the jury verdict finding him guilty of felony Domestic Violence and Attempted Strangulation. On appeal, Hager argues the district court abused its discretion by admitting evidence regarding the argument that led to the domestic violence and attempted strangulation.

Statement of Facts and Course of Proceedings

Jennifer Ashbrook and Hager were married in March of 2014. (8/3/16 Tr., p. 277, Ls. 14-16.) Both Ms. Ashbrook and Hager worked as truck drivers. (8/3/16 Tr., p. 278, Ls. 20-24.) Ms. Ashbrook and Hager divorced in June of 2015. (8/3/16 Tr., p. 278, Ls. 5-8.) Towards the middle of September 2015, Ms. Ashbrook and Hager decided to “start over” and try dating again. (8/3/16 Tr., p. 282, L. 21 – p. 283, L. 14, p. 285, Ls. 19-22.)

Around this time, Hager came to pick up Ms. Ashbrook at a bar. (8/3/16 Tr., p. 279, L. 17 – p. 282, L. 15.) When Hager got to the bar he saw a “gentleman” hitting on Ms. Ashbrook. (Id.) Hager was not happy about it. (Id.) Hager and Ms. Ashbrook repeatedly argued about this occurrence. (8/3/16 Tr., p. 282, Ls. 16-20, p. 336, L. 24 – p. 337, L.14.)

Hager and Ms. Ashbrook went to a bar on March 10, 2016. (8/3/16 Tr., p. 290, L. 13 – p. 292, L. 5.) Both were drinking alcohol. (8/3/16 Tr., p. 292, L. 6 – p. 293, L. 17.) They were getting along until Hager brought up the previous occurrence when the

“gentleman” had hit on Ms. Ashbrook. (8/3/16 Tr., p. 291, L. 25 – p. 292, L. 5, p. 293, L. 18 – p. 294, L. 7.)

After Hager brought up this occurrence the argument escalated until Hager left the bar on foot. (8/3/16 Tr., p. 293, L. 18 – p. 294, L. 14.) After Hager left the bar, he and Ms. Ashbrook exchanged text messages. (8/3/16 Tr., p. 294, L. 25 – p. 296, L. 7; Exs. 10-22.) Hager wrote “Fuck u too” and “Bitch” to Ms. Ashbrook. (Ex. 10.) Ms. Ashbrook responded, “You’re so fucking insecure,” then “I ain’t talking to you,” then “I’m done, I’ve tried to make us work, but just like I told you before, you always bring up the past.” (8/3/16 Tr., p. 297, L. 18 – p. 298, L. 7; Ex. 11.) “The past” referred to the occurrence with the “gentleman” at the bar. (8/3/16 Tr., p. 298, Ls. 1-7; Ex. 11.) More text messages were exchanged, including more references to the occurrence. (See 8/3/16 Tr., p. 303, Ls. 1-12; Exs. 18-20.)

Ms. Ashbrook finished her beer and then went home. (8/3/16 Tr., p. 305, L. 24 – p. 306, L. 14.) Her semi-truck was parked at home in the driveway, and she started it up, to warm it up, and headed into the house. (8/3/16 Tr., p. 306, L. 15 – p. 307, L. 23.) As she was headed into the house, Hager came out the front door and “body checked” her. (Id.) The “body check” knocked her back into the back side of the truck. (Id.)

Eventually, after getting some clothes from inside the house, Ms. Ashbrook climbed into the semi-truck and threw her clothes in the “sleeper.” (8/3/16 Tr., p. 310, L. 1 – p. 312, L. 15.) Hager stepped up to the cab and grabbed Ms. Ashbrook’s sweatshirt and started shaking her. (Id.) Ms. Ashbrook tried to pull away and push Hager, but Hager hit her across the right side of her head. (Id.) After Hager hit her across the head, he hit her with an open hand. (8/3/16 Tr., p. 312, L.19 – p. 314, L. 14.) Hager started

punching her with a closed fist. (Id.) Eventually she was able to get him off of the truck. (Id.) But Hager got back up and continued to hit her with closed fists on the face. (Id.) Ms. Ashbrook again was able to kick Hager off the truck and lock the truck door. (Id.)

Hager started banging on the window, but when he seemed to calm down, Ms. Ashbrook opened the truck door. (8/3/16 Tr., p. 314, L. 15 – p. 317, L. 1.) When she opened the door Hager screamed at her and grabbed her throat. (Id.) The last thing Ms. Ashbrook remembered was Hager grabbing her throat and leaning her back over the seat. (Id.) Ms. Ashbrook thought she was going to die. (Id.) Ms. Ashbrook lost consciousness. (Id.) The next thing she remembered was seeing a police officer. (Id.) A neighbor, Kelly Sunderlin, had called the police. (8/2/16 Tr., p. 120, L. 17 – p. 122, L. 1.)

The state charged Hager with felony Domestic Violence and Attempted Strangulation. (R., pp. 60-61.) Hager tried to plead guilty, but the district court would not accept the guilty plea. (R., p. 64.)

At trial, Ms. Sunderlin, the neighbor who had called the police, testified. (8/2/16 Tr., p. 120, L. 17 – p. 122, L. 1.) Ms. Sunderlin testified she heard a loud argument outside and a “distinct slap.” (Id.) She heard a female crying the whole time. (8/2/16 Tr., p. 126, L. 24 – p. 127, L. 2.) She could see the people arguing in and around a white big rig truck. (8/2/16 Tr., p. 125, L. 12 – p. 126, L. 8.) She saw two figures in the cab of the truck and one figure appeared to be choking the other figure. (8/2/16 Tr., p. 128, L. 14 – p. 129, L. 29, p. 135, L. 20 – p. 136, L. 21.)

Corporal Lindberg testified when he arrived on scene he could hear a male yelling. (8/2/16 Tr., p. 184, L. 4 – p. 186, L. 11.) Corporal Lindberg observed Ms. Ashbrook had blood running down her nose and she had been crying. (8/2/16 Tr., p. 188,

Ls. 18-21.) Ms. Ashbrook was “really disoriented and extremely shaken up” and had a hard time talking. (8/2/16 Tr., p. 189, Ls. 6-22.) Corporal Lindberg also noticed a mark on her chin and a bump on her head. (8/2/16 Tr., p. 190, Ls. 1-12.) Corporal Lindberg investigated the cab of the truck and observed blood smeared across the back seat rest. (8/2/16 Tr., p. 191, L. 17 – p. 192, L. 3.) Corporal Lindberg took photographs. (8/2/16 Tr., p. 192, Ls. 6-16; Exs. 3-6.) Officer Dance testified he observed a red mark on Hager’s shirt that could possibly be blood and a red mark on the knuckle of Hager’s first finger on his right hand. (8/2/16 Tr., p. 165, L. 15 – p. 167, L. 15; Exs. 24-28.)

Stephanie Pullman, an Ada County Paramedic, treated Ms. Ashbrook at the scene. (8/2/16 Tr., p. 172, L. 13 – p. 176, L. 19.) Ms. Ashbrook reported that she had been choked and struck about the face and head multiple times. (Id.) She also reported pain in her jaw and face. (Id.) Ms. Pullman observed swelling and contusion on Ms. Ashbrook’s eye and cheek bones. (8/2/16 Tr., p. 178, Ls. 11-14, p. 180, Ls. 6-13, p. 182, Ls. 5-8.)

Dr. Ross, an emergency room physician, testified that Ms. Ashbrook reported that Hager attacked her and hit her about the face and neck. (8/3/16 Tr., p. 218, L. 13 – p. 219, L. 16.) She reported that Hager punched her multiple times in the face and grabbed her by the neck. (Id.) Dr. Ross observed “significant swelling and bruising over [Ms. Ashbrook’s] face, some significant bruising around her right eye, and obvious signs of trauma over her face.” (8/3/16 Tr., p. 221, Ls. 15-22.)

Cynthia Cook, a registered nurse, testified that Ms. Ashbrook reported that her jaw hurt, her neck hurt and she had difficulty swallowing. (8/3/16 Tr., p. 237, Ls. 9-16.) Ms. Ashbrook also reported symptoms in relation to being strangled. (8/3/16 Tr., p. 237, L.17 – p. 240, L. 3.) Ms. Ashbrook reported that she experienced a loss of consciousness,

lightheadedness, shortness of breath, coughing, difficulty swallowing, and memory loss. (Id.) Nurse Cook also took photographs of Ms. Ashbrook's injuries. (8/3/16 Tr., p. 241, L. 9 – p. 242, L. 4; Exs. 29-45.) Nurse Cook observed a bruise on Ms. Ashbrook's chin, a faint bruise on her neck, and bruising around her eye, right ear, and right shoulder. (8/3/16 Tr., p. 242, L. 6 – p. 246, L. 14; Exs. 29-45.)

Ms. Ashbrook testified at trial. She testified that on March 10, 2016, she and Hager were getting along until Hager brought up the previous occurrence when the "gentleman" had hit on Ms. Ashbrook. (8/3/16 Tr., p. 291, L. 25 – p. 292, L. 5, p. 293, L. 18 – p. 294, L. 7.) After Hager brought up this occurrence, the argument escalated, until Hager left the bar on foot. (8/3/16 Tr., p. 293, L. 18 – p. 294, L. 14.)

Ms. Ashbrook testified about the text messages and Hager hitting and strangling her in the cab of the semi-truck. (See 8/3/16 Tr., p. 294, L. 25 – p. 296, L. 7, p. 310, L. 1 – p. 312, L. 15, p. 312, L.19 – p. 317, L. 1; Exs. 10-22.) She also testified that the day after the attack, she had a hard time swallowing and her throat felt scratchy. (8/3/16 Tr., p. 320, Ls. 8-18.) She had bruising to both of her eyes and on her chin and neck area. (8/3/16 Tr., p. 321, L. 10 – p. 322, L. 6; Exs. 46.)

Hager testified and claimed that Ms. Ashbrook slapped him on the top of his head and kicked him in the chest. (8/3/16 Tr., p. 403, Ls. 3-11.) The jury found Hager guilty of felony Domestic Violence and Attempted Strangulation. (R., p. 136; 8/3/16 Tr., p. 480, L. 6 – p. 481, L. 12.)

The district court entered judgment and sentenced Hager to five years with zero years fixed for felony Domestic Violence and fifteen years with five years fixed for Attempted Strangulation, with the sentences to run consecutively to each other. (R.,

pp. 151-155.) The district court retained jurisdiction. (Id.) Hager timely appealed. (R., pp. 162-166.)

ISSUE

Hager states the issue on appeal as:

Whether the district court failed to use the proper standard when it overruled Mr. Hager's objection to the admission of improper propensity evidence.

(Appellant's brief, p. 5.)

The state rephrases the issue as:

Has Hager failed to show the district court abused its discretion when it overruled Hager's objection to the admission of evidence that showed Hager's motive for the domestic violence?

ARGUMENT

The District Court Did Not Abuse Its Discretion When It Admitted Evidence Regarding Hager's Motive For The Domestic Violence

A. Introduction

Ms. Ashbrook testified that on the night of March 10, 2016, she and Hager were getting along until Hager brought up the previous occurrence where a “gentleman” at a bar had hit on Ms. Ashbrook. (See 8/3/16 Tr., p. 291, L. 25 – p. 292, L. 5.) This argument eventually led to Hager hitting and choking Ms. Ashbrook. The district court overruled Hager’s objections to this testimony. (See 8/3/16 Tr., p 279, L. 14 – p. 282, L. 20.) On appeal, Hager argues the district court abused its discretion because, he argues, the district court did not apply the proper Idaho Rule of Evidence 404(b) analysis. (See Appellant’s brief, pp. 6-10.) The district court did not abuse its discretion because the evidence was not subject to a Rule 404(b) analysis and, even if it was, it was properly admitted to show motive.

B. Standard Of Review

When the appellate court reviews the trial court’s evidentiary rulings, the appellate court applies an abuse of discretion standard. State v. Jones, 160 Idaho 449, 375 P.3d 279 (2016) (citing Dulaney v. St. Alphonsus Reg’l Med. Ctr., 137 Idaho 160, 163–64, 45 P.3d 816, 819–20 (2002)). To determine whether a trial court abused its discretion, the appellate court considers whether the trial court “correctly perceived the issue as discretionary, whether it acted within the boundaries of its discretion and consistently with applicable legal standards, and whether it reached its decision by an

exercise of reason.” Id. (quoting Perry v. Magic Valley Reg’l Med. Ctr., 134 Idaho 46, 51, 995 P.2d 816, 821 (2000)).

“Rule 404(b) provides that generally, evidence of other criminal acts or offenses is inadmissible to prove the character of a person in order to show that he committed the crime for which he is on trial, but that such acts may be ‘admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.’” State v. Tapia, 127 Idaho 249, 254, 899 P.2d 959, 964 (1995) (citing I.R.E. 404(b); State v. Moore, 120 Idaho 743, 745, 819 P.2d 1143, 1145 (1991)). The trial court uses a two-tiered analysis to determine the admissibility of evidence concerning uncharged misconduct. Id. First, the trial court must determine that the evidence is relevant for a proper purpose. Id. Whether the evidence is relevant an issue of law and therefore appellate court exercises free review to determine whether that evidence was relevant. Id. (citations omitted). Second, the trial court determines whether the probative value of the evidence is not outweighed by unfair prejudice. Id. (citations omitted). This second step is reviewed under an abuse of discretion standard. Id.

C. The District Court Did Not Abuse Its Discretion By Admitting Evidence Of The Source Of The Conflict Between Hager And Ms. Ashbrook

Ms. Ashbrook testified that on the night of March 10, 2016, she and Hager were getting along at the bar, until Hager brought up the “occurrence” again. (See 8/3/16 Tr., p. 291, L. 25 – p. 292, L. 5.) The fight then escalated until Hager left the bar on foot. (8/3/16 Tr., p. 293, L. 18 – p. 294, L. 14.) Hager and Ms. Ashbrook then exchanged angry text messages regarding this past occurrence, until Ms. Ashbrook got back to the house. (See 8/3/16 Tr., p. 294, L. 25 – p. 296, L. 7; Exs. 10-22.) When Ms. Ashbrook

got back to the house, Hager choked and punched her. (See 8/3/16 Tr., p. 310, L. 1 – p. 312, L. 15, p. 312, L.19 – p. 317, L. 1.)

Ms. Ashbrook testified about this previous “occurrence” when Hager went to pick up Ms. Ashbrook at a bar and he saw a “gentleman” hitting on her. (See 8/3/16 Tr., p. 279, L. 14 – p. 282, L. 20.) Hager objected. (See id.)

Q. And during that time that the two of you were divorced, did something happen that caused kind of a little bit of a spat between the two of you?

A. Yes.

Q. And what was that?

A. It was – we were – I was at a local bar with another one of my friends, a gentleman was hitting on me, and I knew I couldn’t drive, so I had asked [Hager] to come get us, and he saw it happening, and I don’t remember exactly what was said from the gentleman to me, but he does and it’s always been kind of a –

[Defense Counsel]: Object. This is speculation, Judge.

(Bench conference)

THE COURT: I don’t know what she’ –

[Defense Counsel]: The testimony is she’s saying he remembers. She’s trying to say that my client remembers what was said or knows what was said.

THE COURT: I thought she was going to go into what happened later in terms of the argument, so that’s where I thought she was going.

[Prosecutor]: He keeps bringing it up.

THE COURT: I didn’t take it in the sense the statement of. Rephrase the question.

[Defense Counsel]: While we are here, I object to the relevance of the past acts.

THE COURT: What past acts? This is leading up to the incident.

MS. BUTTRAM: Uh-huh.

[Defense Counsel]: You're talking about this was the night of?

[Prosecutor]: No. What she will say is that he – thereafter he would frequently bring that up and they would argue over it because he would be basically irritated with her behavior that night. This was a common source of argument.

[Defense Counsel]: I would say this is bringing in prior specific acts.

THE COURT: There's no act of violence. The reason for their fighting is like saying we fought over money, there's times she got mad at me. I think it's 404(b) kind of stuff, setting the scene for the relationship stuff. So I'm going to overrule your objection.

(Bench conference concluded.)

THE COURT: The objection is overruled. Would you please direct the witness with a question again.

[Prosecutor]: I will, your Honor.

Q. So it sounds like Mr. Hager had come to pick up [you] and your friends up [sic] at the bar?

A. Correct.

Q. And sometime afterwards he expressed to you dissatisfaction with what he had witnessed when he came?

A. Correct.

Q. Like what did he say to you that alerted you that he was not happy with what he witnessed?

A. He – I really don't remember exactly what he said. He did state that he didn't believe me that I don't remember a lot of the conversation or what he claims that he heard the gentleman say to me, and I don't remember that.

(8/3/16 Tr., p 279, L. 19 – p. 282, L. 3.)

On appeal, Hager argues the district court abused its discretion because the district court did not use the proper standard when it admitted evidence that Hager was upset about the previous occurrence. (See Appellant’s brief, pp. 6-10.) Hager claims this evidence was 404(b) evidence that was not relevant for a “non-propensity purpose.” (See id.) Hager’s argument on appeal is incorrect. Evidence of the argument between Hager and Ms. Ashbrook on the night of the charged conduct is not 404(b) propensity evidence and, even if it was 404(b) evidence, it was properly admitted for non-propensity purposes.

Rule 404(b) “prohibits introduction of evidence of acts other than the crime for which a defendant is charged if its probative value is ‘entirely dependent upon its tendency to demonstrate the defendant’s propensity to engage in such behavior.’” State v. Whitaker, 152 Idaho 945, 948, 277 P.3d 392, 395 (Ct. App. 2012) (citing State v. Grist, 147 Idaho 49, 54, 205 P.3d 1185, 1190 (2009); State v. Avila, 137 Idaho 410, 412, 49 P.3d 1260, 1262 (Ct. App. 2002)). However, the term “acts” or the phrase “other acts” in the rule does not encompass every fact in the case that is not specifically relating to the elements of the charged crime. See State v. Sams, 160 Idaho 917, 919–920, 382 P.3d 366, 368–369 (Ct. App. 2016) (defendant charged with aggravated assault, the Court of Appeals held that evidence of the “standoff” between defendant and police was not 404(b) evidence because 404(b) “does not encompass every fact in the case as opposed to the facts relating to the physical assault itself”); see also State v. Sheldon, 145 Idaho 225, 228, 178 P.3d 28, 31 (2007) (possession of large amounts of cash not an “other act” and not subject to 404(b) analysis because it was physical, circumstantial evidence of the crime); State v. Pullin, 152 Idaho 82, 87, 266 P.3d 1187, 1192 (Ct. App. 2011) (evidence that was part of the criminal episode does not fall within the scope of Rule 404(b)).

“Idaho Rule of Evidence 404(b) is principally designed to protect against admission of purely propensity evidence.” Sams, 160 Idaho at 919–920, 382 P.3d at 368–369. Evidence relating to the origin of the March 10, 2016 argument is not propensity evidence.

Hager objected to evidence explaining the argument that occurred on March 10, 2016, the night of the attack. (8/3/16 Tr., p 279, L. 19 – p. 282, L. 3.) This argument originated because Hager was upset about an earlier occurrence, at another bar, where a “gentleman” hit on Ms. Ashbrook. This March 10, 2016 argument escalated, and continued with text messages, until it culminated in the charged conduct. Evidence that, the night of the crime, Hager was upset about a prior occurrence is not 404(b) evidence because it is not a prior or other act. This is relevant evidence that was part of the criminal episode. It is evidence of Hager’s actions and demeanor the night of the attack and it is not propensity evidence. Simply put, this evidence was not subject to a Rule 404(b) analysis and the district court did not abuse its discretion by overruling Hager’s objection.

Even if the argument between Hager and Ms. Ashbrook was subject to an Idaho Rule of Evidence 404(b) analysis, Hager’s objection was still properly overruled. “Evidence of other crimes, wrongs, or acts is not admissible to prove a defendant’s criminal propensity. However, such evidence may be admissible for a purpose other than that prohibited by I.R.E. 404(b).” State v. Truman, 150 Idaho 714, 249 P.3d 1169 (Ct. App. 2011) (citations omitted). Under I.R.E. 404(b), evidence of prior wrongs or acts may be admitted to prove motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. I.R.E. 404(b); State v. Phillips, 123 Idaho

178, 845 P.2d 1211 (1993). In Grist, the Idaho Supreme Court set forth a two-tiered analysis to determine the admissibility of evidence under I.R.E. 404(b). State v. Naranjo, 152 Idaho 134, 138, 267 P.3d 721, 725 (Ct. App. 2011). “The first tier involves a two-part inquiry: (1) whether there is sufficient evidence to establish the prior bad acts as fact; and (2) whether the prior bad acts are relevant to a material disputed issue concerning the crime charged, other than propensity.” Id. (citing Grist, 147 Idaho at 52, 205 P.3d at 1188).

The second step in a 404(b) analysis involves a determination of whether the evidence, although relevant, should be excluded because the danger of unfair prejudice substantially outweighs its probative value. State v. Sheahan, 139 Idaho 267, 275-76, 77 P.3d 956, 964-65 (2003). Pursuant to I.R.E. 403, relevant evidence may be excluded if, in the district court’s discretion, the danger of unfair prejudice -- which is the tendency to suggest a decision on an improper basis -- substantially outweighs the probative value of the evidence. State v. Ruiz, 150 Idaho 469, 471, 248 P.3d 720, 722 (2010); State v. Floyd, 125 Idaho 651, 654, 873 P.2d 905, 908 (Ct. App. 1994); State v. Nichols, 124 Idaho 651, 656, 862 P.2d 343, 348 (Ct. App. 1993). As previously explained by the Idaho Supreme Court: “Under the rule, the evidence is only excluded if the probative value is *substantially* outweighed by the danger of unfair prejudice. The rule suggests a strong preference for admissibility of relevant evidence.” State v. Martin, 118 Idaho 334, 340 n.3, 796 P.2d 1007, 1013 n.3 (1990) (emphasis in original). Rule 403 does not offer protection against evidence that is merely prejudicial in the sense of being detrimental to a party’s case. See State v. Leavitt, 116 Idaho 285, 290, 775 P.2d 599, 604 (1989) (“Certainly that evidence was prejudicial to the defendant, however, almost all evidence

in a criminal trial is demonstrably admitted to prove the case of the state, and thus results in prejudice to a defendant.”). Rather, the rule protects only against evidence that is unfairly prejudicial, that is, evidence that tends to suggest a decision on an improper basis. Floyd, 125 Idaho at 654, 873 P.2d at 908. As long as the evidence is relevant to prove some issue other than the defendant’s character and its probative value for the proper purpose is not substantially outweighed by the probability of unfair prejudice, it is not error to admit it. State v. Cross, 132 Idaho 667, 670, 978 P.2d 227, 230 (1999).

Application of these principles in this case supports the district court’s decision to admit the challenged evidence. First, there was sufficient evidence to establish the arguments about the prior occurrence as fact and Hager does not challenge that on appeal. (See Appellant’s brief, pp. 6-10.) Second, evidence that Hager was upset about the prior occurrence on the night of the charged conduct was relevant for non-propensity purposes. The past occurrence at the bar was not admitted to show Hager’s bad character but to provide the source of the argument and the motive that led to the charged conduct. And the probative value of this motive evidence is not substantially outweighed by the danger of unfair prejudice. As the district court pointed out, this previous occurrence was just an argument, and “relationship stuff” and did not involve an “act of violence.” (8/3/16 Tr., p. 281, Ls. 6-11.)

THE COURT: There’s no act of violence. The reason for their fighting is like saying we fought over money, there’s times she got mad at me. I think it’s 404(b) kind of stuff, setting the scene for the relationship stuff. So I’m going to overrule your objection.

(Id.) There is no danger of unfair prejudice. The evidence was that Hager and Ms. Ashbrook argued over this past occurrence. It was relevant for motive and the district court did not abuse its discretion when it overruled Hager's objection.

D. Even If The District Court Abused Its Discretion, Any Error Was Harmless

The district court did not abuse its discretion when it admitted evidence that Hager was upset about the previous occurrence at the bar. However, even if the district court abused its discretion, the error was harmless. "Where a defendant alleges error at trial that he contemporaneously objected to, this Court reviews the error on appeal under the harmless error test." State v. Almaraz, 154 Idaho 584, 600-01, 301 P.3d 242, 258-259 (2013) (citation omitted). "[T]he error is harmless if the Court finds that the result would be the same without the error." Id. at 598, 301 P.3d at 256 (citation omitted). The result in this case would have been the same even if the jury had not heard testimony that Hager was upset about the previous occurrence at the bar.

Ms. Ashbrook testified that Hager hit her with an open hand. (8/3/16 Tr., p. 312, L.19 – p. 317, L. 1.) She also testified that Hager punched her with a closed fist and grabbed her throat. (Id.) The neighbor, Ms. Sunderlin, corroborated much of Ms. Ashbrook's testimony. Ms. Sunderlin testified she heard a loud argument, a "distinct slap," and a female crying. (8/2/16 Tr., p. 120, L. 17 – p. 122, L. 1, p. 126, L. 24 – p. 127, L. 2.) She saw two figures in the cab of the truck and one figure appeared to be choking the other figure. (8/2/16 Tr., p. 128, L. 14 – p. 129, L. 29, p. 135, L. 20 – p. 136, L. 21.)

Corporal Lindberg testified Ms. Ashbrook had blood running down her nose, was crying and was "really disoriented and extremely shaken up." (8/2/16 Tr., p. 188, Ls. 18-

21, p. 189, Ls. 6-22.) Corporal Lindberg also testified that Ms. Ashbrook had a mark on her chin and a bump on her head. (8/2/16 Tr., p. 190, Ls. 1-12.) Corporal Lindberg investigated the cab of the truck and observed blood smeared across the back seat rest. (8/2/16 Tr., p. 191, L. 17 – p. 192, L. 3.)

Stephanie Pullman, an Ada County Paramedic, testified that Ms. Ashbrook reported she had been choked and struck about the face and head multiple times. (8/2/16 Tr., p. 172, L. 13 – p. 176, L. 19.) Ms. Pullman observed swelling and contusions on Ms. Ashbrook's eye and cheek bones. (8/2/16 Tr., p. 178, Ls. 11-14, p. 180, Ls. 6-13, p. 182, Ls. 5-8.)

Dr. Ross, an emergency room physician, testified that Ms. Ashbrook reported that Hager attacked her and hit her about the face and neck. (8/3/16 Tr., p. 218, L. 13 – p. 219, L. 16.) Dr. Ross observed "significant swelling and bruising over [Ms. Ashbrook's] face, some significant bruising around her right eye, and obvious signs of trauma over her face." (8/3/16 Tr., p. 221, Ls. 15-22.) Cynthia Cook, a registered nurse, testified that Ms. Ashbrook reported that her jaw hurt, her neck hurt and she had difficulty swallowing. (8/3/16 Tr., p. 237, Ls. 9-16.) Ms. Ashbrook also reported symptoms of being strangled. (8/3/16 Tr., p. 237, L.17 – p. 240, L. 3.) Nurse Cook observed a bruise on Ms. Ashbrook's chin, a faint bruise on her neck, bruising around her eye, right ear, and right shoulder. (8/3/16 Tr., p. 242, L. 6 – p. 246, L. 14; Exs. 29-45.) Even if the jury had not heard about the source of the argument, the jury verdict would have been the same. Any error by the district court was harmless.

CONCLUSION

The state respectfully requests this Court affirm Hager's convictions.

DATED this 18th day of October, 2017.

/s/ Ted S. Tollefson
TED S. TOLLEFSON
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 18th day of October, 2017, served a true and correct copy of the foregoing BRIEF OF RESPONDENT by emailing an electronic copy to:

BRIAN R. DICKSON
DEPUTY STATE APPELLATE PUBLIC DEFENDER

at the following email address: briefs@sapd.state.id.us.

/s/ Ted S. Tollefson
TED S. TOLLEFSON
Deputy Attorney General

TST/dd